RANDOM DRUG TESTING OF FEDERAL EMPLOYEES

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RANDOM DRUG TESTING OF FEDERAL EMPLOYEES

ROBERT L. WOODS

I. INTRODUCTION

As the title of this paper would imply, its subject is random drug testing of federal employees. In particular it will review and analyze recent case law as it applies to the requirements of President Reagan's Drug Free Federal Workplace initiatives. This paper will discuss the Constitutional implications involved in such testing, particularly concentrating on challenges to these programs based upon the Fourth Amendment to the United States Constitution.

II. EXECUTIVE ORDER 12,564[1]

With a few strokes of his pen, President Ronald Reagan established a new front in his war on drugs, namely, the Federal Workplace. He did so by signing Executive Order 12,564 entitled Drug Free Federal Workplace. Effective September 15, 1986, the Executive Order requires the head of each Executive agency to establish a drug testing program for, inter alia, employees in "sensitive positions."[2] The President based the need for this program on the "finding" that "[d]rug use is having serious adverse effects upon a significant proportion of the national workforce and results in billions of dollars of lost productivity

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[1] Executive Order 12,564, 2 CFR 224 (1987), reprinted in 5 U.S.C.A. 7301 (Supp IV, 1987), 51 Fed. Reg. 32,889 (1986).

[2] 51 Fed. Reg. 32,889, at 32,890 (1986). It is this provision (section 3(a)) of the Executive Order that implicitly authorizes random drug testing.

each year."[3] He further found that both on and off duty use of illegal drugs causes decreases in productivity and reliability and increases in absenteeism while also "impair[ing] the efficiency of Federal departments and agencies, undermin[ing] public confidence in them, and mak[ing] it more difficult for other employees who do not use illegal drugs to perform their jobs effectively."[4]

The Executive Order requires federal employees to refrain from using illegal drugs, and establishes that such use is "contrary to the efficiency of the service" and illegal drug users are "not suitable for federal employment."[5]

The President ordered the testing of "employees in sensitive positions"[6], defining that term as pertaining to: (1) positions designated as "Special-Sensitive, Critical-Sensitive, or Noncritical-sensitive" pursuant to Federal Personnel Manual, Chapter 731 or designated sensitive pursuant to Executive Order 10,450; (2) employees granted access to classified information pursuant to Section 4, Executive Order 12,356; (3) Presidential appointees; (4) law enforcement officers as defined in 5 USC 8331(20); and (5) "other positions that the agency head determines involve law enforcement, national security, the

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[3] 52 Fed. Reg. 32,889 (1986).

[4] Id.

[5] Id.

[6] 51 Fed. Reg. 32,889, at 32890 (1986). It should be noted that this paper deals primarily with the random testing of these "employees in sensitive positions."

protection of life and property, public health or safety, or other functions requiring a high degree of trust and confidence."[7] He also directed each agency to establish a program which also permits "voluntary employee drug testing."[8] In addition to testing those in "sensitive positions" and volunteers, the President also authorized, but did not require, testing of all applicants for employment as a precondition of employment and testing all employees, including those in non-sensitive positions, under circumstances where: (1) there is "reasonable suspicion" of illegal drug use; (2) as part of investigations of "accidents or unsafe practice[s]"; or (3) "as part of or as follow-up to counseling or rehabilitation for illegal drug use through an Employee Assistance Program."[9]

Notably, the Executive Order contains several safeguards to personal privacy, including requirements that the programs established pursuant to the Order contain provisions to safeguard the confidentiality of test results and medical records and that "[p]rocedures for providing urine specimens must allow individual privacy,unless the agency has reason to believe that a particular individual may alter or substitute the specimen to be provided."[10]

While the Executive Order directs agencies to take

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[7] 51 Fed. Reg. 32,889, at 32,892 and 32,893 (1986).

[8] 51 Fed. Reg. 32,889, at 32,890 (1986).

[9] Id.

[10] 51 Fed. Reg. 32,889, at 32,891 (1986).

"appropriate personnel actions" for use of illegal drugs, it also directs them to refer such employees to appropriate counseling, treatment or rehabilitation.[11] Disciplinary action is not required if an employee voluntarily identifies himself as a user prior to being identified by other means, provided such employee obtains counseling or rehabilitation and "thereafter refrains from using illegal drugs."[12] On the other hand, the Order mandates that anyone identified as a user who refuses counseling/rehabilitation or who does not refrain from using illegal drugs shall be subject to immediate action to remove the employee from service.[13]

One final observation about the Executive Order is also warranted. The Order specifically states that drug testing shall not be for the "purpose of gathering evidence for use in criminal proceedings," however, it appears to permit (not require) the reporting of results of drug testing to the Attorney General for investigation and/or prosecution.[14] This "permission" has been effectively withdrawn by Congress and agencies are now prohibited from disclosing such information without the employee's express consent.[15]

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[11] Id.

[12] Id.

[13] Id.

[14] Id (emphasis added).

[15] Section 503(e) of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat 391, 468-471, codified at 5 USCA 7301 (1987). See also, 53 Fed. Reg. 11,970, at 11,986 (1988).

III. TYPICAL FEDERAL DRUG TESTING PROGRAMS

Pursuant to the Executive Order[16], the Secretary of Health and Human Services (HHS) has promulgated Mandatory Guidelines for Federal Workplace Drug Testing Programs (hereinafter referred to as HHS guidelines).[17] The HHS guidelines contain, inter alia, scientific and technical requirements regarding the drugs to be tested for, the procedures for collecting urine samples, and the tests and procedures for chemically analyzing the collected urine samples. Congress has also required HHS to review and certify agency drug testing programs for compliance "with applicable provisions of law, including applicable provisions of the Rehabilitation Act of 1973 (29 U.S.C.A. 701 et seq.), title 5 of the United States Code, and the mandatory guidelines...."[18]

As a result, the drug testing programs established or being established by the various Executive agencies are fairly standardized regarding the procedural aspects of urine collection and testing. The typical test scenario[19], if conducted in compliance with the HHS guidelines, would be initiated by a same-day notification (preferably within two hours) of the scheduled

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[16] See supra, footnote 1.

[17] 53 Fed. Reg. 11,970 (April 11, 1988).

[18] Section 503 (a)(1)(A) of the Supplemental Appropriations Act of 1987, Pub. L. 100-71, 101 Stat 391, 468-471, codified at 5 U.S.C.A. 7301 (1987).

[19] This "scenario" is basically a general outline of the provisions of subpart B, sections 2.2 through 2.9 of the HHS guidelines, 53 Fed. Reg. 11,970, at 11,980-11,986.

testing. Upon arriving at the designated test site, the employee would be required to present photographic identification and to remove any unnecessary outergarments which might conceal items which could be used to alter/adulterate the urine sample. The employee will then wash and dry his hands and will be given a sterile specimen jar and directed to a private stall or otherwise partitioned area to provide a sample of at least 60 ml of urine. The testing monitor shall allow for individual privacy (ie., will not visually monitor urination) unless there is a reason to believe that a particular individual may alter or substitute the specimen. The toilet water will be tinted with a blueing agent and no other water source will be available in the stall in order to preclude the possibility of specimen adulteration. After the specimen is furnished, the monitor inspects it for normal temperature and color and adequate volume. The specimen will then be labeled and sealed with a tamperproof seal and this procedure will be witnessed by the employee who furnished the specimen. The specimen will be coded and logged into a permanent logbook and stored in a secured storage area pending shipment to a certified laboratory. The laboratory is certified by HHS and subject to inspections and other elaborate quality assurance techniques.

The HHS guidelines require all applicant and random testing programs to test for marijuana and cocaine[20]. They also authorize, but do not require, testing for opiates, amphetamines,

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[20] 53 Fed. Reg. 11,970, at 11,980 (April 11, 1988).

and phencyclidine.[21] Reasonable suspicion, accident and unsafe practice testing may, along with those drugs mentioned above, also test "for any drug listed in Schedule I or II of the CSA (Controlled Substances Act)."[22] The certified laboratory to which the specimen is sent may subject the specimen to two separate tests. The first test, an immunoassay test, is used to check the specimen for the presence of the drug(s) for which testing has been specified.[23] If the first test is negative, the specimen is disposed of and a negative report is forwarded to the agency. If, however, the first test is positive for the presence of a specified drug, the specimen is subjected to a second, confirmatory test. This confirmatory test employs state-of-the-art technology known as the gas chromatography/mass spectrometry

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[21] Id.

[22] Id. It should also be noted that this section also states that urine specimens "shall be used only to test for those drugs included in agency drug-free workplace plans and may not be used to conduct any other analysis or test unless otherwise authorized by law."

[23] There are a number of immunoassay tests. Two of the more common are the radioimmunoassay (RIA) test used by the U.S. Air Force, among others, in its testing programs and the enzyme multiplied immunoassay test (EMIT) used by the U.S. Customs Service, among others, in its recently challenged testing program. See, N.T.E.U v. von Raab, 109 S.Ct. 1384, at 1389 (1989). These tests have been criticized as being inaccurate however, the criticized inaccuracies do not lie in the tests themselves but rather with those who have been permitted to conduct them. Minimally trained personnel in non-laboratory circumstances have improperly handled the specimens and tests thereby leading to false readings. This deficiency should not pose a problem in a program following the HHS guidelines because of the strict chain of custody requirements and the strict laboratory operating requirements. See, N.T.E.U. v. von Raab, 816 F.2d 170 (5th Cir. 1987) and 53 Fed. Reg. 11,970, at 11,982-11,986 (1988).

(GC/MS) test. Assuming that the strict quality assurance requirements of the HHS guidelines are followed, a positive immunoassay test confirmed by a GC/MS test is highly reliable.[24] It is only following a positive test result by both the initial screening and subsequent confirmatory test that a positive result will then be forwarded to the Agency. Pursuant to the HHS guidelines, the agency must appoint a Medical Review Officer (MRO)[25]. The MRO will receive the reports of positive test results prior to their transmission to agency administrative officials. The MRO must be a licensed physician with knowledge of substance abuse disorders. The MRO will review and interpret the positive test results, conduct a medical interview with the employee and review the individual's medical history and any other relevant biomedical factors. This procedure is designed to be a further safeguard to prevent the possibility of falsely accusing an employee of illegal drug use.[26] It is only after legitimate drug use is ruled out by the MRO that agency administrative officials are notified of a positive test result requiring further administrative action (including possible disciplinary action ranging from reprimand to removal/discharge). In the event of disciplinary action, the employee is afforded certain due process rights in that such actions must be taken in

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[24] See, Dubowski, Drug-use Testing: Scientific Perspectives, 11 Nova L. Rev. 415, 446-484 (1987).

[25] 53 Fed. Reg. 11,970, at 11,985 (1988).

[26] Id.

compliance with applicable administrative procedures, "including the Civil Service Reform Act."[27]

IV. COMMON CHALLENGES TO DRUG TESTING

The most significant challenges facing Federal drug testing programs have been, and will likely continue to be, those based upon the United States Constitution. In particular, government employees and their representatives have asserted violations of the Fifth Amendment (self-incrimination and due process), the "penumbral" rights to privacy provided generally by the entire Constitution,and, perhaps most significantly, the Fourth Amendment (unreasonable search and/or seizure and violation of legitimate expectations of privacy).[28]

A. Fifth Amendment Challenges[29]

As noted above, challenges to drug-testing based upon guarantees provided for by the Fifth Amendment to the United States Constitution come in basically two varieties: (1) those involving the Fifth Amendment's privilege against self-incrimination, and (2) those involving the Fifth Amendment's right to due process. Although it appears, based upon existing case law discussed below, that these arguments should not prevail

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[27] Executive Order 12,564, 51 Fed. Reg. 32,889, at 32,891 (1986).

[28] See, e.g., N.T.E.U. v. Von Raab, 649 F.Supp. 380 (E.D.La.,1986).

[29] U.S. Const. amend V. (1791). The Fifth Amendment provides in pertinent part: "no person... shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law..."

in challenges to the Federal drug-testing programs outlined above, a brief review of these challenges is warranted because the Fifth Amendment is implicated in the provisions of these programs.

1. Self-Incrimination

The United States District Court for the Southern District of New York, in Burka v. New York City Transit Authority,[30] has addressed this issue and found that the challenged drug-testing program did not violate the privilege against self-incrimination. This finding was based upon the Court's conclusions that urinalysis is not "testimonial" in nature and the results of any urinalysis under this program would not be "obtained as part of a criminal investigation, nor do plaintiffs make any allegation that the results would be so used."[31] The Burka Court based these conclusions on United States Supreme Court rulings in Schmerber v. California[32] and McCarthy v. Arndstein[33] , respectively. In Schmerber [34], the Supreme Court ruled that evidence obtained from the chemical analysis of a blood sample taken over the objections of the

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[30] 680 F.Supp. 590, at 611-612 (S.D.N.Y. 1988).

[31] Id.

[32] 384 U.S. 757, 86 S.Ct. 1826, 16 L.Ed.2d 908 (1966).

[33] 266 U.S. 34, 45 S.CT. 16, 69 L.Ed. 158 (1924).(holding that the privilege "applies alike to civil and criminal proceedings, wherever the answer might tend to subject to criminal responsibility him who gives it."). Id, at 40.

[34] 384 U.S. 757 (1966).

'donor' did not violate the privilege against self-incrimination because the "privilege is a bar against compelling 'communications' or 'testimony,' but that compulsion which makes a suspect or accused the source of 'real or physical evidence' does not violate it... [and] [s]ince the blood test evidence...was neither petitioner's testimony nor evidence relating to some communicative act or writing of the petitioner, it was not inadmissible on privilege grounds."[35] The Fifth Circuit Court of Appeals, in N.T.E.U. v. von Raab[36], similarly found that urinalysis is not testimonial in nature and therefore does not violate the privilege against self-incrimination.[37]

As applied to the Federal drug-testing programs, outlined above, the reasoning of these Courts would appear to shield these programs from the self-incrimination argument because urinalysis results, whether compelled or not, are not testimonial and they are not to be used for purposes of criminal prosecution.[38]

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[35] Id, at 764-765.

[36] 816 F.2d 170 (5th Cir. 1987), aff'd ____ U.S. ____, 109 S.Ct. 1384, ___ L.Ed.2d ___ (1989). It should be noted that the Supreme Court did not address the Fifth Amendment issue as it was not raised by the Petitioners. See, Brief of the United States of America, section B.3.

[37] Id, at 181. See also, Rushton v. Nebraska Public Power District, 653 F.Supp. 1510 (D.Neb. 1987).

[38] Pub.L. 100-71, section 503(e), 101 Stat. 391, 471 (1987). The purpose of the provision prohibiting the release of test results, except in limited, specified circumstances, was to "avoid misuse and the possibility of criminal prosecution or any adverse action by any other agency or individual." (133 Cong. Rec. H5680 (daily ed. June 27, 1987) (statement of conferees)).

2. Due Process

The Fifth Amendment's prohibition against deprivation of "life, liberty, or property without due process of law" is necessarily implicated by the Federal drug-testing programs from both a substantive and procedural standpoint. Substantive due process "provides a shield against arbitrary and capricious deprivations..." while procedural due process imposes certain procedural requirements (ie.,notice and hearing requirements) to be adhered to prior to the deprivation.[39]

If the reliability of a drug-testing program or the chemical analysis it employs is so questionable that it can be found to be arbitrary and capricious, it may be found to constitute a violation of substantive due process. The plaintiffs in Rushton argued that the defendant's drug-testing program violated their substantive due process rights because the unreliability of the drug test employed (EMIT) thereby subjected them to a risk of a false-positive reading.[40] The United States District Court rejected this argument because the defendants also subjected the urine specimen to a confirmatory GC/MS test which is highly "accurate and reliable."[41] A similar ruling was reached by the

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[39] See, Rushton v. Nebraska Public Power District, 653 F.Supp. 1510, 1525 (D.Neb. 1987).

[40] Id.

[41] Id.

Fifth Circuit Court of Appeals in N.T.E.U. v. von Raab.[42]

Another type of substantive due process violation may arise if an adverse personnel action is taken against an employee on the basis of a drug-test if it cannot be demonstrated that there is a "nexus" "between the articulated grounds for an adverse personnel action and either the employee's ability to accomplish his or her duties satisfactorily or some other legitimate governmental interestpromoting the'efficiency of theservice.'" [43] "Absent a nexus between the 'cause' asserted here [illegal drug use]... and 'promotion of the efficiency of the service,' the adverse action must be condemned as arbitrary and capricious for want of a discernible rational basis."[44]

The Supreme Court has thus far recognized three government interests--integrity of the workforce, public safety, and protection of sensitive information-- that may be relied upon to justify these intrusions on the privacy of employees.[45] Therefore, one of these interests, or some similar interest, may need to be included in showing the requisite nexus. The Civil

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[42] 816 F.2d 170, 181-182 (5th Cir. 1987), aff'd 109 S.Ct. 1384 (1989). See,supra, footnote 8. But see, Jones v. McKenzie, 628 F.Supp. 1500 (D.D.C. 1986) (wherein the Court indicated that failure to conduct a confirmatory test could result in a due process violation).

[43] Doe v. Hampton, 566 F.2d 265, 272 (D.C. Cir. 1977).

[44] Id.

[45] N.T.E.U. v. Von Raab, ___ U.S. ___, 109 S.Ct. 1384, ___ L.Ed.2d ___ (1989);Skinner v. Railway Labor Executives Association, ___ U.S.___, 109 S.Ct. 1402, ___ L.Ed.2d ___ (1989); See also, Harmon v. Thornburgh, 1989 U.S. App. LEXIS 9415, 9-10 (1989).

Service Reform Act of 1978 (hereinafter 'CSRA')[46] permits adverse personnel actions "only for such cause as will promote the efficiency of the service."[47] The CSRA further prohibits actions based on conduct "which does not adversely affect performance."[48] An argument might be made that Executive Order 12,564[49] mandates disciplinary actions for all employees who have a positive drug test thereby violating an employee's substantive due process rights and statutory rights in circumstances where the agency cannot show that the employee's performance was "adversely affected" by illegal off-duty drug use. Pursuant to precedent[50] established by the United States Merit Systems Protection Board, an "agency may show a nexus linking an employee's off-duty misconduct with the efficiency of the service [by]: (1) a rebuttable presumption of nexus that may arise in 'certain egregious circumstances' based on the nature and gravity of the misconduct; (2) a showing ny preponderant evidence that the misconduct affects the employee's or his co-workers' job performance, or management's trust and confidence in the employee's job performance; and (3) a showing by preponderant

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[46] Civil Service Reform Act of 1978, Pub. L. No. 95-454, 92 Stat. 1111 (1978)(codified at 5 U.S.C.A. ss 1101-1105 (1982 & Supp IV 1986)).

[47] 5 U.S.C.A. s 7513(a) (1982).

[48] 5 U.S.C.A. s 2302(b)(10) (1982).

[49] See,supra, footnotes 3-5 and accompanying text.

[50] Kruger v. Department of Justice, 32 M.S.P.R. 71,74 (1987).

evidence that the misconduct interfered with or adversely affected the agency's mission."[51] Absent a showing of nexus, an adverse action may be overturned despite the language of Executive Order 12,564.[52]

Procedural due process (notice and an opportunity to be heard) concerns should not pose a significant problem for Federal agency drug-testing programs because of the statutorily provided procedures which must be followed in order to institute an adverse action.[53] The United States Supreme Court, in Cleveland Board of Education v. Loudermill[54], held, that in order to satisfy procedural due process requirements, "'something less than a full evidentiary hearing is sufficient prior to adverse administrative action."[55] The Court further required a pre-termination notice of the charges, and pre-termination explanation of the agency's evidence, and a pre-termination opportunity for the employee to present his side of the story to the agency.[56] These requirements are satisfied by the procedural safeguards provided to Federal employees.[57]

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[51] Id.(citations omitted).

[52] 51 Fed. Reg. 32,889 (1986).

[53] See, 5 U.S.C.A. ss 7503 and 7513.

[54] 470 U.S. 532 (1985).

[55] Id. at 545 (quoting Matthews v. Eldridge, 424 U.S. 319, at 343(1976)) (1985).

[56] Id.

[57] See, 5 U.S.C.A. s 7503 and 7513.

B. "Penumbral" Rights to Privacy

The United States Court of Appeals for the Fifth Circuit, in N.T.E.U. v. Von Raab[38], recognized that an argument based upon the theory of the "penumbral" rights to privacy might have been presented as a challenge to the U.S. Customs Service drug-testing program.[39] While the Court expressed no opinion on that issue (because it had not been raised) they did note that "even the areas sheltered by such rights are limited by countervailing state interests."[40] The U.S. Supreme Court has recognized that the U.S. Constitutions provides our citizenry with a "zone of privacy" that may not be intruded upon by the government.[41] It has been suggested that "[e]mployee drug testing potentially violates the individual zone of privacy in three ways: (1) it involves the [government] in the traditionally private and personal act of urination; (2) it allows the government to intrude upon non-work related activities performed in the sanctity of the home; and, (3) it reveals confidential medical information found in the urine."[42] As applied to the Federal drug-testing programs outlined above, it appears that the

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[38] 816 F.2d 170, 181 (5th Cir. 1987).

[39] Id.

[40] Id.(citing, Griswold v. Connecticut, 381 U.S. 479 (1965) and Roe v. Wade, 410 U.S. 113, 153-54 (1973)).

[41] See, Griswold v. Connecticut, 381 U.S. 479, 484 (1965) and Roe v. Wade, 410 U.S. 113, 152 (1973).

[42] Bookspan, Behind Open Doors: Constitutional Implications of Government Employee Drug Testing, 11 Nova L. Rev. 307, 366 (1987).

"penumbral" rights to privacy argument should not pose a significant barrier. The Federal programs are required to allow for individual privacy during the act of urination[43], thereby resolving the first "potential violation" listed above. The Courts have generally limited these rights to family matters[44] and therefore this author believes it unlikely that illegal drug use, even in the sanctity of one's home, will not be protected. Finally, the regulations governing the Federal drug-testing programs explicitly prohibit the testing of urine samples for anything other than the specific illegal drugs enumerated in the regulation.[45]

C. Fourth Amendment Challenges

While the United States Supreme Court has very recently ruled in favor of drug testing on Fourth Amendment grounds, in thus far limited circumstances, the Court has yet to rule on the constitutionality of random testing or other important aspects of the Federal drug testing program.[46] Therefore, for purposes of this paper, it is appropriate to first review the parameters of

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[43] See, supra, footnotes 10 and 19 and accompanying text.

[44] See, e.g., Griswold v. Connecticut, 381 U.S. 479 (1965)(prohibition against use of contraceptives found to be violation of a fundamental right of privacy of married persons) and Roe v. Wade, 410 U.S. 113 (1973)(criminal abortion statute violates mother's privacy interest in decision to terminate pregnancy).

[45] See, supra, footnote 22.

[46] See, N.T.E.U. v. Von Raab, ___ U.S. ___, 109 S.Ct 1384, ___ L.Ed.2d ___ (1989); and Skinner v. Railway Labor Executives' Association, ___ U.S. ___, 109 S.Ct. 1402, ___ L.Ed.2d ___ (1989).

Fourth Amendment analysis and then review these recent decisions as applicable to the Federal programs.

The fourth amendment to the United States Constitution provides: "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched and the persons or things to be seized."[47] The threshold issue to be resolved in any fourth amendment analysis is the determination of whether the intrusion in question is a search or seizure. Obviously, if the intrusion does not constitute either a search or a seizure then the fourth amendment protections are not implicated. The determination of whether an intrusion amounts to a fourth amendment search turns upon the concept of whether the person subjected to the intrusion (a drug test) has a "reasonable expectation of privacy" in that which has been intruded upon (the act of urination and the personal information available in the urine sample through chemical analysis).[48] This threshold issue has only recently been settled with regard to government compelled urinalysis drug testing. The United States Supreme Court, in Skinner v. Railway Labor Executives Association[49],

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[47] U.S. Const. amend IV.

[48] See, Katz v. United States, 389 U.S. 347 (1967).

[49] ___ U.S. ___, 109 S.Ct. 1402, 1413, ___ L.Ed.2d ___, (1989). It should be noted that the Supreme Court, while recognizing that taking a urine sample might also constitute a

confirmed what every Federal Court of Appeals that had had occasion to rule on the issue had already concluded; namely, that "[b]ecause it is clear that the collection and testing of urine intrudes upon expectations of privacy that society has long recognized as reasonable... these intrusions must be deemed searches under the Fourth Amendment."[70]

"The fundamental command of the Fourth Amendment is that searches and seizures be reasonable...."[71] Reasonableness depends upon the context of the search.[72] "The test of reasonableness under the Fourth Amendment is not capable of precise definition or mechanical application. In each case it requires a balancing of the need for the particular search against the invasion of

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seizure within the meaning of the Fourth Amendment since it "may be viewed as a meaningful interference with the employee's possessory interest in his bodily fluids...", found it unnecessary to so characterize the taking of urine samples because those privacy expectations were adequately accounted for in their "search" analysis. Id, at fn 4.

[70] Id, at 1413. Accord, N.T.E.U. v. Von Raab, ___ U.S. ___, 109 S.Ct. 1384,1390, ___ L.Ed.2d ___ (1989). See also, Shoemaker v. Handel, 795 F.2d 1136, 1142 (3rd Cir. 1986) (impliedly finding urine drug testing to be a search by applying Fourth Amendment analysis to the N.J. State Racing Commission drug testing program for jockeys, trainers, grooms and/or officials);Policemen's Benevolent Ass'n v. Township of Washington, 850 F.2d 133, 135-136 (3rd Cir. 1988); N.T.E.U. v. Von Raab, 816 F.2d 170, 175 (5th Cir. 1987); Penny v. Kennedy, 846 F.2d 1563, 1565 (6th Cir. 1988); Division 241 Amalgamated Transit Union v. Soucy, 538 F.2d 1264, 1267 (7th Cir. 1976); Rushton v. Nebraska Public Power District, 844 F.2d 562, 566 (8th Cir. 1988); Railway Labor Executives Association v. Burnley, 839 F.2d 575, 579-80 (9th Cir. 1987); Everett v. Napper, 833 F.2d 1507, 1511 (11th Cir. 1987); Jones v. McKenzie, 833 F.2d 335, 338 (D.C. Cir. 1987).

[71] New Jersey v. T.L.O., 469 U.S. 325, 340 (1985).

[72] Id, at 337.

personal rights that the search entails."[73]

"To hold that the Fourth Amendment applies to [these intrusions]... is only to begin the inquiry into the standards governing such searches."[74] Historically, the United States Supreme Court has required searches be conducted only in accordance with a valid search warrant "issued by a neutral and detached magistrate"[75] upon a showing of probable cause.[76] However, the Supreme Court has fashioned numerous exceptions to the warrant based on probable cause requirement.[77] These exceptions generally pertain to circumstances wherein there exists a diminished expectation of privacy or some exigent circumstance, absent which a showing of probable cause is

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[73] Bell v. Wolfish, 441 U.S. 520, 559 (1979).

[74] New Jersey v. T.L.O., 469 U.S. 325, 337 (1984).

[75] Coolidge v. New Hampshire, 403 U.S. 443, 450 (1971).

[76] See, e.g., Spinelli v. United States, 393 U.S. 410, 412 (1969); Aguilar v. Texas, 378 U.S. 108, 115 (1964).

[77] See, e.g., O'Connor v. Ortega, 107 S.Ct. 1492 (1987) (authorizing an administrative search of an employee's desk and files); New York v. Burger, 107 S.Ct. 2636 (1987) (authorizing an administrative search of closely regulated industry); U.S. v. Montoya de Hernandez, 473 U.S. 531 (1985) (authorizing border searches); New Jersey v. T.L.O., 469 U.S. 325 (1985) (authorizing the search of a student's handbag on school premises); Illinois v. Lafayette, 462 U.S. 640 (1983) (authorizing an inventory search); U.S. v. Watson, 423 U.S. 411 (1976) (authorizing consent searches); Coolidge v. New Hampshire, 403 U.S. 443 (1971) (authorizing a "plain view" exception); Terry v. Ohio, 392 U.S. 1 (1968) (authorizing "stop and frisk" searches); Warden v. Hayden, 387 U.S. 294 (1967) (authorizing "hot pursuit"); Schmerber v. California, 384 U.S. 757 (1966) (authorizing "exigent circumstances" exception); Carroll v. U.S., 267 U.S. 132 (1925) (authorizing the "automobile exception"); Weeks v. U.S., 232 U.S. 383 (1914) (authorizing a search incident to a lawful arrest).

required.[78]

In 1985, the Supreme Court established its latest exception to the warrant and probable cause requirement. Justice Blackmun, in New Jersey v. T.L.O.[79], indicated in his concurrence that there sometimes exist "exceptional circumstances in which special needs, beyond the normal need for law enforcement, make the warrant and probable- cause requirement impracticable...."[80] The Court found within the public school environment there exists "a substantial need of teachers and administrators for freedom to maintain order..." such that the probable cause standard is not required.[81] Instead, the Supreme Court indicated that a search in such circumstances should be reviewed for "reasonableness, under all the circumstances."[82] The Supreme Court went on to hold that "[d]etermining the reasonableness of any search involves a twofold inquiry: first, one must consider, 'whether the ... action was justified at its inception,' Terry v. Ohio, 392 U.S., at 20; second, one must determine whether the search as actually conducted 'was reasonably related in scope to the circumstances which justified the interference in the first

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[78] See, New Jersey v. T.L.O., 469 U.S. 325, 358 (opinion of BRENNAN, J.) (1984).

[79] 469 U.S. 325, 351 (1984).

[80] Id.

[81] Id, at 341.

[82] Id.

place,' ibid."[83] In O'Connor v. Ortega [84], the Supreme Court relied upon this "special needs, beyond the normal need for law enforcement"[85] principle to avoid the need for the warrant and probable cause requirement in an employment situation where an employer conducted an administrative search of an employee's desk and file cabinets.[86] The Supreme Court further noted that a "warrant requirement is not appropriate when 'the burden of obtaining a warrant is likely to frustrate the governmental purpose behind the search.'"[87] Thus, the Supreme Court held that "public employer intrusions on the constitutionally protected privacy interests of government employees for noninvestigatory, work-related purposes, as well as for investigations of work-related misconduct, should be judged by the standard of reasonableness under all the circumstances."[88] The Supreme Court explained that "[o]rdinarily, a search of an employee's office by a supervisor will be 'justified at it's inception' when there are reasonable grounds for suspecting that the search will turn up evidence that the employee is guilty of work-related misconduct...."[89] Citing its' decision in New Jersey v. T.L.O.,

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[83] Id.

[84] 107 S.Ct. 1492 (1987).

[85] Id, at 1500.

[86] Id,at 1502.

[87] Id, at 1499.(citations omitted).

[88] Id, at 1502.

[89] Id,at 1503.

the Supreme Court also noted that "[t]he search will be permissible in its scope when 'the measures adopted are reasonably related to the objectives of the search and not excessively intrusive in light of ... the nature of the [misconduct].'"[90] The Supreme Court held that "[b]ecause the petitioners had an 'individualized suspicion' of misconduct by Dr. Ortega, [the Court] need not decide whether individualized suspicion is an essential element of the standard of reasonableness that [they adopted]."[91]

It is upon the foundation built by the Supreme Court in New Jersey v. T.L.O.[92] and O'Connor v. Ortega[93], that the Court has built its decisions regarding government-compelled drug testing of employees. As mentioned earlier, the Supreme Court's decisions in Skinner v. Railway Labor Executives' Association[94] and National Treasury Employees Union v. Von Raab[95] are the Court's first and most recent decisions regarding the legality of such drug testing. Because the particular drug testing programs

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[90] Id. It should be noted that the Supreme Court expressly declined to "address the proper Fourth Amendment analysis for drug and alcohol testing of employees." Id, at 1504.

[91] Id, at 1503. See also, New Jersey v. T.L.O., 469 U.S. 325, 342 (1984)(wherein the Court also declined to decide whether "individualized suspicion" is an essential element of the reasonableness standard because the school authorities did have such suspicion to search.)

[92] 469 U.S. 325 (1984).

[93] 107 S.Ct. 1492 (1987).

[94] 109 S.Ct. 1402 (1989).

[95] 109 S.Ct. 1384 (1989).

at issue in Skinner[96] and NTEU[97] are not directly on point with those proposed in Executive Order 12,564[98], it is important for purposes of this paper to outline the Skinner and NTEU programs in order to draw conclusions about the applicability of these decisions to the Federal programs.

1. SKINNER: The Testing Program

In Skinner, the program at issue was instituted via regulations promulgated by the Federal Railroad Administration (hereinafter FRA) at 49 CFR s 219.101 et seq (1987).[99] These regulations were issued as a result of findings by the FRA that "alcohol and drug abuse by railroad employees poses a serious threat to safety."[100] The regulations contain two relevant sections pertaining to alcohol and drug testing, namely, Subparts C and D. Subpart C[101] of the regulation, entitled "Post-Accident Toxicological Testing"[102] is mandatory

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[96] 109 S.Ct. 1402 (1989).

[97] 109 S.Ct. 1384 (1989).

[98] Supra, note 1. Although it should be noted that the testing program at issue in NTEU is a Federal program subject to the Executive Order and HHS guidelines described earlier in this paper. However, the NTEU program presented to the Court was not as broad in coverage as the programs set out in the Executive Order. (See, discussion of NTEU program infra).

[99] 109 S.Ct. 1402, 1408 (1989).

[100] Id, at 1407. Petitioners submitted substantial evidence belying the nature and extent of the alcohol and drug problems facing the nations railroads. Id,at 1407-1409.

[101] 49 CFR s 219.201 et seq (1987).

[102] Id. (emphasis added).

for all railroads and requires "all covered employees ... directly involved ... provide blood and urine samples for toxicological testing by FRA."[103] The tests are mandated upon the occurrence of: (1) "major train accidents" which are those that involve a "fatality ..., a release of hazardous materials accompanied by an evacuation or reportable injury ..., or, damage to railroad property of $500,000;"[104] (2) "impact accident" where a collision results in a reportable injury or damage to railroad property of $50,000 or more;[105] or, (3) "any train incident that involves a fatality to any on-duty railroad employee."[106] Subpart D [107] of the regulations, entitled "Authorization to Test for Cause" is permissive and allows railroads to require employees to submit to breath or urine tests: (1) after a reportable incident or accident "where a supervisor has a 'reasonable suspicion' that an employee's acts or omissions contributed to the occurrence or severity of the accident or incident;"[108] or (2) "in the event of certain specific rule violations, including noncompliance with a signal and excessive speed."[109] A railroad is also authorized to order breath or

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[103] 109 S.Ct. 1402, 1408 (1989).

[104] Id.

[105] Id.

[106] Id, at 1409.

[107] Id, at 1409. (49 CFR 219.301 et seq.)

[108] Id.

[109] Id.

urine tests in circumstances where a supervisor has a "reasonable suspicion" that the employee is under the influence of alcohol or drugs, based upon personal observation of personal appearance, behavior, speech, body odor, etc.[110] However, urine testing under these circumstances may only be directed if the appropriate determination is made by two supervisors, one of whom "must have received specialized training in detecting the signs of drug intoxication" and both must suspect the employee of being under the influence of a substance other than alcohol.[111] Employees tested pursuant to Subpart D may also voluntarily submit to a blood test to be analyzed at an independent medical facility.[112] The collection and chemical analysis procedures and requirements of the FRA program are similar to those described in section III of this paper, however, they are conducted at a medical facility by medical personnel and they too must use confirmatory GC/MS tests before reporting a "positive" drug test.[113] The FRA program also requires that employees be "notif[ied] of the results... and [given] an opportunity to respond in writing before preparation of any final investigative report."[114]

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[110] Id.

[111] Id, at 1409-1410.

[112] Id, at 1410. The purpose of allowing the employee to submit a blood sample for independent analysis is to enable the employee to rebut the presumption of impairment which is permitted when the breath or urine tests are "positive." Id.

[113] Id. It should also be noted, however, that the Federal programs do not contemplate conducting blood tests.

[114] Id, at 1409.

Employees who refuse to submit to the tests "may not perform covered service for nine months, but they are entitled to a hearing concerning their refusal to take the test."[115] The customary sanction for alcohol or drug possession or intoxication is dismissal.[116]

The program upheld in Skinner was applied in a factual situation which is similar to that of one of the permissive areas in which an employee might be subject to drug testing in a Federal program under the provisions of the Executive order; namely, postaccident or unsafe practices testing[117]. These testing situations both require the occurrence of some event (accident or unsafe practice/rule violation), however, neither require probable cause nor "individualized suspicion" that the employee(s) to be tested are under the influence of illegal drugs or that their illegal drug use caused or contributed to the occurrence of the accident or unsafe practice/rule violation. A significant and, perhaps, essential factor that led to the ruling upholding the FRA program at issue in Skinner was the presentation of evidence reflecting an actual (or at least perceived) alcohol and drug problem which pervaded the Railroad

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[115] Id, at 1409.

[116] Id, at 1407.

[117] 109 S.Ct. 1402, 1408-1409 (1989); and, 51 Fed. Reg. 32,889, 32,890 (1986).

Industry[118]. It may be unlikely that any Executive agency would be able to produce any such evidence, thus bringing into question whether an agency program calling for suspicionless postaccident or unsafe practice testing could withstand Constitutional scrutiny as to that aspect of its program[119].

2. NTEU: The Testing Program

In NTEU[120], the testing program at issue was established in May 1986[121] at the direction of the Commissioner of Customs who stated that he believed that "Customs is largely drug-free," but that "unfortunately no segment of society is immune from the threat of illegal drug use."[122] The Commissioner indicated that drug interdiction had become the primary mission of the agency and that "there is no room in the Customs Service for those who break the laws prohibiting the possession and use

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[118] See, NTEU v. Von Raab, 109 S.Ct. 1384, 1398-1399 (SCALIA, J. Dissenting, with whom Justice STEVENS joins)(1989). Here, Justice Scalia indicates that the reason he "joined the Court's opinion [in Skinner was] because the demonstrated frequency of drug and alcohol use by the targeted class of employees, and the demonstrated connection between such use and grave harm, rendered the search a reasonable means of protecting society." Id.

[119] On the other hand, it could be argued that the five members of the majority in NTEU, who were also members of the majority in Skinner, would not require such evidence as an essential factor of the reasonableness test.

[120] 109 S.Ct 1384 (1989).

[121] Id, at 1388. It should be noted that this program was established prior to the effective date (Sept. 15, 1986) of Executive Order 12,564. See, supra, note 1.

[122] Id, at 1387-1388.

of illegal drugs."[123] Under the program, employees and applicants are required to submit a urine sample for chemical analysis whenever they are tentatively selected to be promoted or hired into a position that satisfies one or more of three listed criteria. Those criteria include: (1) a position having "direct involvement in drug interdiction or enforcement of related laws;" (2) a position requiring the incumbent to "carry firearms;"and/or (3) a position requiring the incumbent to "handle 'classified' material."[124] The incumbents to these types of positions are advised in writing that their" final selection is contingent upon successful completion of drug screening."[125] They are given five days advance notice of the test day and site and may decline to submit to testing but doing so renders them ineligible for that particular promotion.[126] The Customs drug testing program comports with the procedural and technical requirements of the HHS guidelines outlined above in Part III of this paper.[127] "Customs employees who test positive for drugs and who can offer no satisfactory explanation are subject to dismissal from the Service."[128]

The testing program at issue in NTEU is most closely on

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[123] Id, at 1388.

[124] Id.

[125] Id.

[126] Id.

[127] Id, at 1389.

[128] Id.

point with the Federal programs which are the focus of this paper. This is so mainly because they incorporate the same collection and testing procedures required by the HHS guidelines and they are directed at employees who seek positions which would fall within the definition of the "sensitive positions" which would be subject to mandatory drug testing pursuant to Executive Order 12,564.[129] Namely, they involve "law enforcement" and/or "other functions requiring a high degree of trust and confidence."[130] However, the NTEU case is distinguishable on at least two factual grounds[131]. First, the program at issue in NTEU applies only to applicants or those seeking promotion to the covered positions[132], whereas the Executive Order applies to employees currently assigned to the covered positions as well as applicants and those seeking promotions to covered positions[133]. Second, the Customs program only requires testing one time prior to a promotion/hiring into a covered position[134], whereas the

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[129] Supra, at note 1. 51 Fed. Reg. 32,889 (September 17, 1986).

[130] Id, at 32,892-32,893.

[131] It should be noted that each individual federal program promulgated by the various Executive agencies may be distinguishable on numerous other grounds depending upon the nature of the agency's mission, the extent of its program, etc. See,e.g., Harmon v. Thornburgh, 1989 U.S. App. LEXIS 9415 (D.C.Cir. June 30, 1989).

[132] 109 S.Ct. 1384, 1388 (1989). See, supra, note 123 and accompanying text.

[133] 51 Fed. Reg. 32,889, 32,890 (1986).

[134] 109 S.Ct. 1384, 1388 (1989).

requirements of the Executive Order may involve testing employees on a random basis whereby an employee may be subject to numerous drug tests over the course of his/her tenure depending on the luck of the draw[135].

3. SKINNER and NTEU: The Issue Presented

The sole issue presented in both cases was whether the program in question, as described above, violated the Fourth Amendment to the United States Constitution.[136] At each stage of the litigation in these cases the various courts[137] found that the programs implicated the Fourth Amendment. Specifically, the collection and chemical analysis of employees' urine, under the terms of these programs, constituted a search within the terms of the Fourth Amendment because they constituted a government-compelled intrusion upon the tested employees reasonable expectation of privacy.[138] The lower courts, however, were in

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[135] 51 Fed. Reg. 32,889, 32,890 (1986). I use the term "may" because section 3(a) of the Executive Order places "within the discretion of the agency head the extent to which such employees are tested." Id.

[136] Id, at 1387;and, 109 S.Ct. 1402, 1407 (1989).

[137] In Skinner, the courts involved were the United States District Court for the Northern District of California (Bench Decision), and the United States Court of Appeals for the Ninth Circuit (839 F.2d 575 (1988)). In NTEU, the courts involved were the United States District Court for the Eastern District of Louisiana (649 F.Supp. 380 (1986)), and the United States Court of Appeals for the Fifth Circuit (816 F.2d 170 (1987)).

[138] See, 109 S.Ct. 1384, 1389-1390 (1989); and, 109 S.Ct 1402, 1410-1411 (1989).

disagreement as to whether these searches were reasonable.[139] The United States Supreme Court agreed with those Courts that found these programs to be reasonable searches.[140]

After finding that the collection and chemical analysis of employees' urine, as provided for in the programs at issue, constituted a search within the ambit of the Fourth Amendment, the Court, through the pen of Justice Kennedy, went on to find that the Government's interests in both cases "present[ed] 'special needs' beyond normal law enforcement that may justify departures from the usual warrant and probable-cause requirements."[141] This finding led to the application of a balancing test to determine reasonableness under all the circumstances wherein the "'intrusion on the individual's Fourth Amendment interests [is balanced] against its promotion of

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[139] In Skinner, the District Court upheld the program as a reasonable search but was later reversed by the Court of Appeals which, applying the "reasonableness under all the circumstances" test, concluded that "particularized suspicion is essential to a finding that toxicological testing of railroad employees is reasonable." 109 S.Ct 1402, 1410 (1989). In NTEU, the District Court enjoined the Customs' program finding that it "constitutes an overly intrusive policy of searches and seizures without probable cause or reasonable suspicion...." 649 F.Supp. 380, 387 (E.D.La. 1986). This ruling was overturned by a divided panel of the Court of Appeals finding the searches to be reasonable under all the circumstances. 816 F.2d 170, 179 (5th Cir. 1987).

[140] 109 S.Ct. 1384, 1390 (1989);and, 109 S.Ct. 1402, 1411 (1989).

[141] 109 S.Ct. 1384, 1390 (1989); 109 S.Ct. 1402, 1414 (1989).

legitimate governmental interests.'"[142] In applying this balancing test, the Court found in both cases that the government interests were sufficiently compelling and the individual privacy interests were sufficiently diminished under the circumstances to preclude insistence on the need for either a warrant or a showing of probable cause. In fact, the government interests were found to be so compelling and the individual interests so minimal that not even a showing of individualized suspicion was required.[143]

The compelling government interests present in these cases include: (1) maintaining the integrity of the unique mission of the Customs Service as "our Nation's first line of defense" in the drug war[144]; (2) protection of public safety from those who "'discharge duties fraught with such risks of injury to others that even a momentary lapse of attention can have disastrous consequences;'"[145] and (3) safeguarding "truly sensitive information."[146] Thus, the Court appears to be requiring some

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[142] 109 S.Ct. 1402, 1414 (1989)(quoting Delaware v. Prouse, 440 U.S. 648, 654 (1979)).

[143] Id, at 1416-1417; 109 S.Ct. 1384, 1392 (1989).

[144] 109 S.Ct. 1384, 1392 (1989).

[145] Id, at 1393.(quoting Skinner, 109 S.Ct. 1402, 1419 (1989). This was the sole supporting interest in Skinner.

[146] Id, at 1396. The Supreme Court remanded to the Court of Appeals that portion of the Customs program requiring testing of those seeking positions requiring the "handl[ing] of classified material", directing the Court to "clarify the scope of this category" by determining whether covered positions enable employees to actually "gain access to sensitive information." Id, at 1397. The Court went on to direct that "[i]n assessing the

level of justification before testing would be considered "reasonable." The question remaining, however, is how much justification is necessary? While recognizing that the employees subject to testing certainly had a privacy interest in the act of urination and in the information obtainable from their urine via chemical analysis, the Court found that those interests had been significantly minimized by the procedures adhered to by the government in these programs. Specifically, the Court in NTEU enumerated the following factors that, when taken together, significantly minimize the intrusiveness of the program: (1) only applicants and tentative promotees are tested and they know in advance that testing is part of the selection process; (2) employees are notified 5 days in advance of the testing date; (3) there is no direct observation of the act of urination; (4) urine samples are analyzed only for the specified drugs and no other personal information regarding the presence of other drugs, conditions or ailments may be tested for; (5) the tests are highly accurate assuming proper required procedures are followed; and (6) employees need not disclose personal medical information unless the results of the test are positive, and then only to a licensed physician.[147] Another factor that was discussed as

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reasonableness of requiring tests of these employees, the court should also consider pertinent information bearing upon the employees' privacy expectations, as well as the supervision to which these employees are already subject." Id.

[147] Id, at 1394, fn 2. It should be noted that the Court did not indicate whether any of these factors is essential but rather that taken together "they significantly minimize the intrusiveness of the Service's drug screening program." Id.

minimizing the intrusiveness of both programs was the lack of discretion vested in those charged with administering the programs when it came to suspicionless testing.[148] In Skinner, besides noting some of the procedural aspects listed above as minimizing, the Court also considered the fact that railroad employees' expectation of privacy has been diminished by the fact that they are employed in an "industry that is regulated pervasively to insure safety ...."[149] On balance, therefore, the Court ruled that the government interests at stake outweighed the employees' privacy rights such that the searches satisfied the constitutional requirements of the Fourth Amendment.

4. SKINNER and NTEU Applied

As noted above, the programs approved in these cases can be distinguished from the broader programs envisioned by President Reagan in Executive Order 12,564, therefore it is not clear exactly how these principles might be applied to any given Federal program. The Supreme Court did not establish any clear rules for analyzing the legitimacy of these programs and therefore it appears inevitable that these programs will be challenged individually until the announcement of some "bright line" rule(s) or an abandonment of these programs by the Administration.

The United States Court of Appeals for the District of

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[148] See, 109 S.Ct. 1384, 1391 (1989)(quoting from Camara v. Municipal Court, 387 U.S. 523, 532 (1967)); and 109 S.Ct 1402, 1416 (1989).

[149] 109 S.Ct. 1402, 1418 (1989).

Columbia Circuit is the first court to analyze and apply the Skinner and NTEU decisions to a Federal program initiated pursuant to the directive of Executive Order 12,564. In Harmon v. Thornburgh[150], the Court of Appeals reviewed certain aspects of the "Department of Justice Drug-Free Workplace Program for the Offices Boards and Divisions" (hereinafter "OBD Plan") applying these decisions. The Court had earlier granted Petitioners a permanent injunction forbidding "DOJ to implement a random urinalysis drug-testing program covering three categories of [DOJ] employees: prosecutors in criminal cases, employees with access to grand jury proceedings, and personnel holding top secret national security clearances."[151] The OBD plan had been originally struck down by the District Court because it was not "justified at its inception" because "[d]efendants concede[d] that illegal drug use [was] not a problem in the [DOJ]."[152] The Court of Appeals felt compelled, based upon the decision in NTEU, to modify the injunction to permit the DOJ to test employees in the third category (top secret clearance holders).[153]

Interestingly, the Court of Appeals saw no relevance in the

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[150] 1989 U.S. App. LEXIS 9415 (decided June 30, 1989).

[151] Id, at *1. The suit also sought injunctive relief from testing of Presidential appointees and personnel responsible for maintaining, storing or safeguarding a controlled substance. The Court of Appeals refused to enjoin that aspect of DOJ's program because no such employee was a plaintiff in the suit and therefore the existing plaintiffs did not have standing regarding that aspect of the plan. Id, at *7.

[152] Harmon v. Meese, 690 F.Supp. 65, 69 (1988).

[153] 1989 U.S. App. LEXIS 9415, 2 (June 30, 1989).

fact that the DOJ program required random urinalysis of covered employees who were assigned to testing-designated positions. Appellees had raised this as a significant factor distinguishing the case at Bar from the Skinner and NTEU cases. The Court of Appeals dismissed this argument by pointing to the fact that this was only one factor of several that must be taken together.[154] In reviewing the government interests which the Supreme Court had recognized "which might , in appropriate circumstances, be sufficiently compelling to justify mandatory testing even in the absence of individualized suspicion,"[155] the Court of Appeals made the following conclusions. First, with regard to the government's interest in mission integrity, the court ruled that "the government may search its employees only when a clear, direct nexus exists between the nature of the employee's duty and the nature of the feared violation."[156] Thus, the court appears to require a mission related to drug interdiction before the agency can rely on this interest to justify testing. This seems apparent from the court's observation that DOJ might establish a constitutional testing program covering employees "having substantial responsibility for the prosecution of federal drug offenders."[157] Second, with regard to the public safety

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[154] Id, at *12-13.

[155] Id, at *8-10. See, supra, notes 144-146 and accompanying text for a description of these interests.

[156] Id, at *17.

[157] Id, at *19.

interest, the court found that the "public safety rationale adopted in [NTEU] and Skinner focused on the immediacy of the threat. The point was that "a single slip-up by a gun-carrying agent or a train engineer may have irremediable consequences; the employee himself will have no chance to recognize and rectify his mistake, nor will other government personnel have an opportunity to intervene before the harm occurs."[158] Thus the court would not find reasonable the reliance on the public safety rationale in circumstances were the threat to public safety was more attenuated. Finally, with regard to the protection of sensitive information rationale, the court recognized that the Supreme Court in NTEU "did not define precisely what categories of information would be sufficiently 'sensitive' to warrant mandatory drug testing."[159] They went on to find that whatever categories might later be included, certainly the category at issue before them (top secret national security information) would be covered and therefore testing of employees granted such clearance was reasonable.

V. ANALYSIS AND CONCLUSION

These cases establish or reaffirm a number of general rules, however, they also leave unanswered a number of significant questions. The general rules include: (1) "urine tests are searches ... [which] must meet the reasonableness

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[158] Id, at *21.

[159] Id, at *25.

requirements of the Fourth Amendment;"[160] (2) "...neither a warrant nor probable cause, nor, indeed, any measure of individualized suspicion, is an indispensable component of reasonableness in every circumstance;"[161] (3) no evidence of a perceived drug problem among agency employees covered by the testing program is required to justify the intrusions;[162] and,(4) "where a Fourth Amendment intrusion serves special governmental needs, beyond the normal need for law enforcement, it is necessary to balance the individual's privacy expectations against the Government's interests to determine whether it is impractical to require a warrant or some level of individualized suspicion in the particular context."[163]

Some of the questions that remain unanswered include, (1) whether these decisions are fact specific and thereby applicable only to postaccident and pre-employment/pre-promotion situations involving drug interdiction positions and positions which can

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[160] 109 S.Ct. 1384, 1390 (1989);accord, 109 S.Ct. 1402, 1413 (1989).

[161] 109 S.Ct. 1384, 1390 (1989); accord, 109 S.Ct. 1402, 1416-1417 (1989).

[162] See, 109 S.Ct. 1384, 1395 (1989). Justice Kennedy wrote that "[t]he mere circumstance that all but a few of the employees tested are entirely innocent of wrongdoing does not impugn the program's validity." Id, citing Camara v. Municipal Court, 387 U.S. 523 (1967) and United States v. Martinez-Fuerte, 428 U.S. 543 (1976). See,supra, notes 139 and 140 and accompanying text.

[163] 109 S.Ct. 1384, 1390 (1989); accord, 109 S.Ct. 1402, 1413-1414 (1989).

potentially imperil public safety;[164] (2) whether any of the factors deemed relevant by the Court in establishing the constitutionality of these programs is essential to such a finding; and, (3) what constitutes "truly sensitive information" such that those seeking employment/promotion in positions handling such information could be subject to drug testing?[165]

These decisions appear to be landmarks in Fourth Amendment law in that they mark the first time in the history of Fourth Amendment analysis that the Supreme Court has upheld a "full-scale" "...Government search ... aimed at a person and not simply the person's possessions" without at least "... some individualized suspicion to justify the search."[166] While they purport to apply the tests established in their earlier case of New Jersey v. T.L.O.,[167] the opinion will be searched in vain for

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[164] See, 109 S.Ct. 1402, 1423 (1989)(Justice MARSHALL, with whom Justice BRENNAN joins, dissenting). Justice Marshall, writing in his stinging dissent, noted that "[t]he majority purports to limit its decision to postaccident testing of workers in 'safety-sensitive' jobs ... much as it limits its holding in [NTEU] to testing of transferees to jobs involving drug interdiction or the use of firearms." Id.(citations omitted).

[165] See. NTEU, 109 S.Ct. 1384, 1396-1397 (1989). It should be noted that the Court declined to "assess the reasonableness of the Government's testing program insofar as it covers employees who are required 'to handle classified material'", instead remanding that portion of the case to the Court of Appeals to "further clarify the scope of this category of employees subject to testing." Id. However, the Court did recognize a compelling government interest in protecting "truly sensitive information" which could outweigh individual privacy interests to the extent that suspicionless drug testing could be required. Id.

[166] See, 109 S.Ct. 1402, 1424-1425 (Justice MARSHALL, with whom Justice BRENNAN joins, dissenting)(1989).

[167] 469 U.S. 325, 341 (1984).

an articulation of the "two-fold inquiry" said to be required in "determining the reasonableness of any search"[168] That test requires that first a search must be "justified at its inception."[169] Although the Court, in both New Jersey v. T.L.O.[170] and O'Connor v. Ortega[171] declined to decide whether individualized suspicion was required, it would seem 'reasonable', assuming this "two-fold inquiry" is in fact required, to require at least some evidence of a problem facing the government agency implementing the search. The government officials in both New Jersey v. T.L.O.[172] and O'Connor v. Ortega[173] had an individualized suspicion of misconduct thereby justifying their searches at their inception. The FRA, according to the facts presented in Skinner, at least had some fairly substantial evidence of an alcohol abuse problem affecting the entire Railroad industry and some lesser evidence of a drug abuse problem to justify implementation of their program.[174] However, the U.S. Customs Service had no such evidence and, in fact, the Commissioner of Customs was quoted as having said that he

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[168] Id.(emphasis added).

[169] Id. (citing Terry v. Ohio, 392 U.S. 1 (1968)). See, supra, notes 80-82 and accompanying text.

[170] 469 U.S. 325, 342 (1984); See, supra, note 90.

[171] 107 S.Ct. 1492, 1504 (1987); See, supra, note 89.

[172] 469 U.S. 325, 341 (1984).

[173] 107 S.Ct. 1492, 1503 (1987).

[174] 109 S.Ct. 1402, 1407-08 (1989).

believed that "Customs is largely drug-free...."[175] Apparently, the Court accepts the Commissioner's opinion that "unfortunately no segment of society is immune from the threat of illegal drug use,"[176] as ample justification at the programs inception, although the Court never directly addresses this prong of the test. These inconsistencies in analysis tend to lend some credence to Justice Scalia's dissenting view that "the Customs Service rules are a kind of immolation of privacy and human dignity in symbolic opposition to drug use."[177]

In applying these decisions to the programs required by Executive Order 12,564, it is apparent that some testing may be permitted. As it now appears, the mandatory testing of "employees in sensitive positions" will depend upon whether they involve (1) drug interdiction, (2) duties "fraught with such risks of injury to others that even a momentary lapse of attention could have disastrous consequences,"[178] and/or (3) access to "truly sensitive information."[179] As noted above [180] the term "employee in a sensitive position" is specifically defined in section 7(d) of the Executive Order. In reviewing

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[175] 109 S.Ct. 1384, 1387 (1989).

[176] Id, at 1388.

[177] Id, at 1398.

[178] NTEU v. Von Raab, 109 S.Ct. 1384, 1393 (1989); Skinner v. RLEA, 109 S.Ct. 1402, 1419 (1989).

[179] 109 S.Ct. 1384, 1396 (1989).

[180] See, supra, notes 6 and 7 and accompanying text.

that definition, it appears that many of the types of positions enumerated may be subject to drug testing. In particular, it would seem likely, based upon these Supreme Court and D.C. Circuit decisions, that employees described in section 7(d)(4) of the Executive Order (law enforcement officers) and in section 7(d)(5) ("other positions...involving law enforcement, national security, the protection of life and property, public health and safety, or other functions requiring a high degree of trust and confidence.") may be subject to testing if they fit within the description of the "public safety" or "truly sensitive information" interests described above. Under these "interests" it appears that those who are required to carry firearms, those who operate, maintain, or work closely with heavy machinery or vehicles, those directly involved in fire protection, air traffic controllers, medical personnel who have access to drugs and/or who administer to or operate on patients, those involved in or who have direct access to matters of national security, and others in similar positions might be subject to suspicionless testing. It would also appear, although not discussed at length in this paper, that agencies that choose to exercise the authority granted to them in section 3(c) of the Executive Order[101] could constitutionally test any employee based on a "reasonable suspicion that an employee [is impaired by] illegal drugs" or as part of an investigation into the causes of an accident or unsafe practice involving public safety concerns.

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[101] 51 Fed. Reg. 32,889, 32,890 (1986).

It remains unclear whether the random nature of the testing required by these programs will pose a significant barrier to their implimentation. As noted above, the programs at issue in NTEU and Skinner required testing that was triggered by the occurrence of some particular event; either application for, or tentative selection to, a covered position or the occurrence of a specified type of accident or rule violation. Neither contemplated/specified random testing of employees currently assigned to a testing designated position where they were selected for testing based upon the random drawing of their social security number. It is certainly possible to construe these two Supreme Court decisions very narrowly and confine them to their facts. However, as noted above, the D.C. Circuit Court of Appeals has not found it necessary to limit the NTEU decision to pre-employment or pre-promotion testing. As Chief Judge Wald noted in Harmon v. Thornburgh [102], regarding such limiting, "the Supreme Court has not encouraged the construction of such a theory."[103] After finding that the random nature of a program is but one of many factors to consider, he continued by noticing that "[c]ertainly the random nature of the OBD testing plan is a relevant consideration; and, in a particularly close case, it is possible that this factor would tip the scales. We do not believe, however that this aspect of the program requires us to undertake a fundamentally different analysis from that pursued by

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[102] 1989 U.S. App. LEXIS 9415 (June 30, 1989).

[103] Id, at *14.

the Supreme Court in Von Raab."[194] It remains to be seen how other courts will interpret these cases and, ultimately, how and whether the Supreme Court will resolve these issues.

As I noted above, it appears inevitable that these programs will continue to be challenged individually until a more precise rule(s) of analysis is(are) established by the Supreme Court. These cases appear to be but the initial salvo in the war against the war on drugs.

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[194] Id, at *15.